BEFORE THE STATE OF WASHINGTON
ENERGY FACILITY SITE EVALUATION COUNCIL

In the matter of: APPLICATION NO. 99-1 SUMAS ENERGY 2 GENERATION FACILITY	NO. 99-01 WHATCOM COUNTY'S RESPONSE TO MOTION FOR RECONSIDERATION

INTRODUCTION

SE2 moves for reconsideration on two grounds. They argue first that the Council has misapplied the controlling law and then they argue that the Council could reverse its decision and grant a permit if only it were to entertain a new and different application (one which purportedly addresses all the Council's voiced concerns). Given the traditional scope for a tribunal's power of reconsideration, the first request is one which can properly be raised within the context of such a motion, although it must be denied on its merits (actually the lack thereof). The second request seeks relief which is well beyond that which may be sought via reconsideration and must be denied on procedural and constitutional grounds.

Counsel for Whatcom County has had an opportunity to review the response submitted by Counsel for the Environment to SE2's motion. In an effort to avoid repetition, the County joins in, supports, and incorporates that briefing in its entirety. In addition, Whatcom County wishes to supplement with the following.

ARGUMENT

I. The Council need not reconsider its finding that energy facilities should offer some demonstrable state energy benefit in deciding whether a particular merchant plant's adverse impacts are acceptable.

Under issues identified as A1 through A3, SE2 argues that the Council has misapplied the mandates of Chapter 80.50 RCW by balancing the need for energy against the facility's potential negative societal and environmental impacts. According to SE2, no balancing test is required.

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This is just plain wrong. SE2 is simply telling half the story, omitting all the statutory references to the statutorily required balancing test.

To fill in the other side of the equation, the Council should note (as it has) that RCW 80.50.010 also provides that "[i]t is the intent to seek courses of action that will balance the increasing demands for energy facility location and operation in conjunction with the broad interests of the public." This balancing of interests includes a charge to the Council to "preserve and protect the quality of the environment; to enhance the public's opportunity to enjoy the esthetic and recreational benefits of the air, water and land resources; to promote air cleanliness; and to pursue beneficial changes in the environment." Furthermore, the legislature has charged the Council to select sites for the location of facilities that "will produce minimal adverse effects on the environment, ecology of the land and its wildlife, and the ecology of state waters and their aquatic life." Given these operating parameters, there is clear legislative direction to the Council to perform just the sort of balancing test that was performed in this case. Therefore, the Council's application of the controlling law to the facts of this case has been entirely proper. There is nothing here which merits reconsideration.

Under Issue A1, SE2 also seems to argue that since the Council has found that there is an increasing need for energy in the region, it must likewise find that all merchant plants, even those like SE2 without any commitments whatsoever to supply local needs, will necessarily provide benefit to local consumers. Apparently, simply because the plant exists, benefits must necessarily flow to local energy consumers. Given the evidence produced (or rather the lack of thereof), SE2's contention does not necessarily follow. After all, since SE2 repeatedly reminded the Council during the hearing that it could (or would) not guarantee that any of its power would be offered to consumers within the state, how can benefits automatically flow?

When the Council drew the conclusion that as proposed SE2 would not likely provide any demonstrable benefit to local energy consumers, it dutifully pointed to many facts in the record supporting that conclusion. While SE2 would have preferred the Council to have reached a different conclusion (and argues as much), just because a different conclusions could have been reached does not support a claim that the Council abused its discretion in reaching the conclusion it did. As our state Supreme Court observed in State ex rel. Perry v. City of Seattle, 69 Wash.2d 816, 420 P.2d 704 (1966):

> A decision by an administrative commission is not arbitrary and capricious simply because a trial court and this court conclude, after reading the record, that they would have decided otherwise had they been the administrative commission. Where a tribunal has been established to hold inquiries and make decisions as to whether an employee shall be dismissed, review by the judiciary is limited to determining whether an opportunity was given to be heard and whether competent evidence supported the charge. State ex rel. Schussler v. Matthiesen, 24 Wash.2d 590, 166 P.2d 839 (1946), and cases cited therein. The crucial question is whether or not there is evidence to support the commission's conclusion. A finding or a conclusion made without evidence to support it, is, of course,

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> arbitrary. State ex rel. Tidewater-Shaver Barge Lines v. Kuykendall, 42 Wash.2d 885, 891, 259 P.2d 838 (1953); but it is not arbitrary or capricious if made with due consideration of the evidence presented at the hearing. *See* Miller v. City of Tacoma, 61 Wash.2d 374, 390, 378 P.2d 464 (1963), and cases cited. The instant case meets this test. Neither the trial court nor this court can substitute its judgment for the independent judgment of the civil service commission. State ex rel. Wolcott v. Boyington, *supra*.

Id at 821.

Given the facts on the record and those cited by the Council in support of its characterization of the lack of local benefits from SE2, there is little likelihood that the Council's decision could under the applicable standard of review be construed as contrary to law. The Council's decision was not arbitrary or capricious and will withstand testing if need be.

At page 5 of their motion, SE2 stresses that insufficient generating supplies have resulted in price instability. SE2 argues that "…one need only have occasionally read the newspaper in recent months to realize how much worse the situation has become." SE2 motion for reconsideration, page 5, line 5-7. Given SE2's propensity for introducing new evidence, *see, e.g.*, Appendix B to their motion, the Council may wish to take SE2 up on that challenge and read a recent article from the Bellingham Herald entitled "Report: Calif. overcharged for power," which is attached hereto as "Appendix A." According to this recent news, an economist hired by power grid managers in California and that state's auditor believe that manipulations within the wholesale energy market in that state have caused more than $6.2 billion in overcharges to electrical consumers. Obviously, as the existing record shows, there are two sides to such arguments. But the bottom line in either case is that RCW 80.50.010 cannot be read to mandate that the protection of the environment or the welfare of the people must give way during periods of increasing energy demands.

In spite of the fact that SE2 reads 80.50.010 as containing a "statutory command to increase energy facilities," see Motion at page 6, line15, there is no such command. The legislature's direction is, as stated above, to allow for increased energy production in a manner which will best serve the demands in the state of Washington and best protect its citizens and the environment. The controlling law has been correctly applied by the Council.

In relation to Issue A2, SE2 seems to take the stance that since the Council has allowed for mitigation in regard to previously permitted facilities, it cannot demand more in this instance. Under RCW 80.50.010 the Council is directed to provide a position of state "with respect to each site." Each project is to be scrutinized / analyzed on its own merits. It is illogical under this statutory framework to suggest, as does SE2, that the Council's decisions from other projects must control the conclusions to be reached in respect to a different project and site. There is no such requirement under chapter 80.50 RCW.

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SE2 also seems to argue that the Facility Siting Statute limits the Council's ability to protect the environment and welfare of the people by mandating that it must recommend approval with only 'available and reasonable methods' to "minimize environmental impacts" as added conditions. Motion for Reconsideration, page 6 line 34. After all, SE2 argues, the Council's previous decisions have never required full mitigation of negative impacts. However, if this were truly the case, the Council could never recommend against a project.

SE2's assertion that permits must be granted with conditions to offset adverse impacts, takes the Council's authority and objectives out of context. Elsewhere in chapter 80.50 RCW the Council is clearly given the authority to reach the conclusion, as it did in this case, that the site proposed is simply not suitable for a particular project. *E.g.*, RCW 80.50.100(1). A recommendation favoring an application with mitigation of negative impacts is absolutely not required of the Council. When the facts support the conclusion (as they have here) that the negative impacts of a proposed facility cannot be adequately mitigated, and that the energy benefits to the state are at best speculative, it is within the Council's power to say no.

Turning next to Issue A3, SE2 submits that they can fulfill the need and consistency requirements of the Siting Statute. At this late juncture in the proceedings, SE2 has finally realized that their steadfast desire to run a totally uncommitted merchant plant is somewhat contrary to the state's energy policy. As a result SE2 now wishes to modify its stance on purchase agreements in hopes of tipping the balancing test of RCW 80.50.010 in their favor. Reversing its stance, SE2 offers to commit a certain percentage of its output to purchase agreements. Given the importance placed upon the fulfillment of our state's energy needs in the siting decision, this concession represents a significant and core change to SE2's application. By making this offer, and those in relation to additional mitigation measures, SE2 has in essence submitted a new and different application. They now seek to amend their application within the context of a reconsideration motion. This is request in not only untimely, but, as further explained in the next section, outside the permissible scope of a reconsideration motion.

WAC 463-42-690 mandates that amendments to applications must be completed within 30 days of the beginning of the adjudicative hearing. In pertinent part, it provides as follows:

> (1) Applications to the council for site certification shall be complete and shall reflect the best available current information and intentions of the applicant.
> (2) Amendments to a pending application must be presented to the council at least thirty days prior to the commencement of the adjudicative hearing, except as noted in subsection (3) of this section.
> (3) Within thirty days after the conclusion of the hearings, the applicant shall submit to the council, application amendments which include all commitments and stipulations made by the applicant during the adjudicative hearings.

Clearly what SE2 is attempting to do is to backdoor an amendment to their application in the guise of a motion for reconsideration. This strategy is not permitted under the Council's procedural rules and must not be rewarded. The Council must reject this request for what it is,

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an untimely amendment. To rule otherwise would undermine the rules of procedure and, for the reasons more fully discussed below, violate due process.

II. SE2's request for the Council to consider a modified application goes well beyond the permissible scope of a motion for reconsideration, violating the Council's adopted procedures and due process. The request must be denied.

In hopes of gaining a permit SE2 now asks the Council to consider a modified permit application. This request is embodied in their motion as "Issue B." In contrast to SE2's position, Whatcom County believes the record in this matter supports the Council's decision to deny the permit application due to the many negative impacts and dangers the project poses to the community. Remember, just because there can be different reads on the evidence, it doesn't mean the decision is flawed or arbitrary. State ex rel. Perry v. City of Seattle, 69 Wash.2d 816, 821, 420 P.2d 704 (1966). The Council need not worry about reversal due to this claim. However, if the Council were to fall prey to this facet of SE2's reconsideration ploy, it would violate the traditional rules governing reconsideration motions, its own rules of procedure, and the due process rights of the opposing parties.

In order for the Council to adequately assess SE2's motion for reconsideration, it must determine whether the relief requested is available in the context of the motion. To make this determination it is important for the Council to understand the rules which govern reconsideration under the Washington Administrative Procedure Act (WAPA) and the common law in general. A cursory review of those parameters is therefore appropriate, particularly since it will indicate that the Council must deny SE2's requested relief.

When the legislature created the Energy Facility Site Evaluation Council, it empowered and directed the Council to establish, in accordance with the WAPA, its own set of procedural rules to carry out its functions. RCW 80.50.040(1)and(3). The procedural rules promulgated by the Council to govern the adjudicative process are found in chapter 463-30 WAC. In regard to motions for reconsideration, the only direct reference is WAC 463-30-335. Since the procedures adopted by the Council must generally conform with the WAPA, another potential source of information should be the Act's own provision on reconsideration found at RCW 34.05.470. Unfortunately for us, neither rule provides much in the way of guidance as to what the permissible grounds for reconsideration are or the scope of relief available to the moving party. For that we must look elsewhere.

A good first step toward understanding the issue can be found in the guiding principles underlying the WAPA. In adopting the WAPA the legislature expressed the following intent:

> The legislature intends, by enacting this 1988 Administrative Procedure Act, to clarify the existing law of administrative procedure, to achieve greater consistency with other state and the federal government in administrative

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> procedure, and to provide greater public and legislative access to administrative decision making....The legislature also intends that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts.

RCW 34.05.001.

Given the near absence of clear guidance within the WAPA and the Council's own rules in relation to reconsideration motions, our ability to look beyond our own rules and common law to those of other jurisdictions and model acts is very useful. It allows us to better define what parameters govern the decision to be made.

Turning first to the standard of judicial review which would be employed should the Council's decision ultimately be appealed, one finds that the appellant would have a very heavy burden to shoulder in such an appeal. As it is solely within the discretion of the Council to grant or deny a motion for reconsideration, a denial of the motion would be overturned only upon a clearest showing that an abuse of discretion took place. Duval Corp. v. Donovan, 650 F.2d 1051 (CA, 9th Cir., 1981)(*citing:* Reese Sales Co. v. Hardin, 458 F.2d 183, 186 (9th Cir.1972); Northeast Broadcasting, Inc. v. FCC, 400 F.2d 749, 758 (D.C.Cir. 1968). See also NLRB v. Fort Vancouver Plywood Co., 604 F.2d 596, 601 (9th Cir. 1979), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1275, 63 L.Ed.2d 599 (1980) (motion to reopen). More specifically, under the WAPA the Council's action would have to be found arbitrary and capricious in order warrant reversal by a court. RCW 34.05.570(c); *see also*, ARCO Products Co. v. Washington Utilities and Transp. Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995)(holding both the "substantial evidence" and the "arbitrary and capricious" standards are highly deferential; thus, a discretionary decision under the WAPA will not be reversed absent a clear showing of abuse). Furthermore, simply because there may be room for differing opinions, as we saw with the concurring opinions in this case, an agency action taken after due consideration would not be viewed as having been arbitrary and capricious even though a reviewing court may believe it was erroneous. Snider v. Board of County Com'rs of Walla Walla County, 85 Wn.App. 371, 932 P.2d 704 (Div. 3, 1997); State ex rel. Perry v. City of Seattle, *supra*. In sum, not only is the Council's final order unlikely to be subject to successful attack on appeal, but a denial of SE2's motion for reconsideration would likewise be fairly bulletproof. [1]

There are policy considerations which weigh against liberally granting relief based on a motion for reconsideration. Policies exist for limiting the grounds for reconsideration. The court in Bookman v. United States, 453 F.2d 1263 (Court of Claims, 1972), presented those concerns as follows:

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[1] In contrast, should the Council decide to grant the relief requested, for the reasons explained elsewhere herein, not only can a violation of due process be asserted by the aggrieved parties, but an assertion of unlawful procedure can be had under RCW 34.05.570(3)(c). The Council needs to be concerned with the procedural rights of all parties, not just SE2 in this instance.

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> Any inquiry into the reconsideration powers of an administrative agency must take full cognizance of the broad policy considerations succinctly defined by Mr. Chief Justice Warren in Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 321, 81 S.Ct. 1611, 1617, 6 L.Ed.2d 869 (1961):
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> > 'Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what ultimately, appears to be the right result on the other.'
>
> It is often the case that reconsideration of a prior decision, within a reasonable period of time, is absolutely essential to the even administration of justice. For example, it may be imperative for the tribunal to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict. More frequently, reconsideration is often the sole means of correcting errors of procedure or substance. There may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct. *See generally* 2 Davis, Administrative Law Treatise § 18.08 (1958).
>
> The importance of the right of reconsideration is dependant upon the importance of the challenged decision. That is to say, the public's interest in a 'right result' is consonant with the expanding application of the decision either in terms of the number of individuals directly or presently affected, or its future precedent value.
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> ... For these reasons, it is the general rule that '[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify it judgment, decree, or order' 2 Davis, *supra*, at 606.

Bookman at 1265.

The thoughts of the court in Bookman are instructive. According to Chief Justice Warren, any reconsideration request brings with it a burden of balancing the need for finality in judgments verses the need for correct results. In the present case, the Council has already determined that the public interest is best served without the existence of SE2 at Sumas given the applicant's offered design and operating conditions. The concern for the safety and welfare of the public already has been thoroughly and thoughtfully considered by the Council. In terms of balancing the interests involved, the scale certainly tips in favor of finality at this juncture.

The opinion of the Bookman court also shows that the Council must be concerned with setting a poor precedent by its decision. This is particularly true in light of the fact that for SE2, reconsideration is not their last hope. Under the procedure contemplated by our legislature, if SE2 wished to offer a modified application after a denial, that prerogative is certainly open to

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them pursuant to RCW 80.50.100(3). Given the alternative remedy provided by our legislature, Chief Justice Warren's scale again should tip in favor of finality at this point in the process.

The Bookman decision indicates that reconsideration may best be reserved for corrections of errors. Adopting that belief, our own Supreme Court has seen fit to limit an agency's right to revisit their final decisions. According to the Washington State Supreme Court, reconsideration is best reserved for those instances in which a decision was reached through fraud, mistake, or a misconception of the facts. In re Quackenbush, ___ Wn.2d ___ , 16 P.3d 638, 643 (Feb. 1, 2001)(*citing*, St. Joesph Hosp.& Health Care Ctr. v. Dep't of Health, 125 Wn.2d 733, 743, 887 P.2d 891 (1995); Hall v. City of Seattle, 24 Wn.App. 357, 362, 602 P.2d 366 (1979)). Utilizing reconsideration as a vehicle to correct errors has been extended to rectifying misinterpretations of the law as well. For example, the Equal Employment Opportunity Commission was found not to have abused its discretion in reconsidering a prior decision because that decision had been clearly based on an erroneous interpretation of the law. Lasley v. Veteran Admin., 789 F. Supp. 1468 (E.D. Mo., 1992).

From these decisions, it may be fair to conclude that reconsideration requests are best limited to rectifying errors stemming from factual or legal errors, as opposed to simply giving parties a second bite at the apple. As amply argued by Counsel for Abbotsford, reconsideration has never been perceived as a means of allowing parties to reconfigure a permit application or case theory in such a fashion.

Because our legislature seeks consistency in the application of our administrative code and its procedures, it is instructive to look at how many of our own state's agencies have strived to limit the grounds upon which reconsideration may be brought. For example, the Human Rights Commission limits reconsideration to those times when a party believes the administrative law judge has "overlooked or misunderstood something." WAC 162-08-311. The Department of Health limits reconsideration of final orders to specific errors of fact or law, or orders requiring departmental action which is inconsistent with it established practices, or to cases in which the person affected is unable to comply with the terms of the order. WAC 246-10-704. The Department of Community, Trade and Economic Development limits reconsideration to rectifying errors of procedure or misinterpretation of fact or law, or procedural irregularities which prevented a party from having fair hearing, or clerical mistakes in the final order. WAC 242-02-832. Finally, the Employment Security Department limits reconsideration to those times when there has been an obvious clerical error or when the moving party, through no fault of his own, has been denied a reasonable opportunity to present argument or response. WAC 192-04-190. These examples indicate again that the grounds for reconsideration are typically limited to rectifying errors of law, fact, or procedure.[2]

[2] It is also important to note that the administrative procedures of some state agencies are specifically exempted from the mandates of the WAPA, so interagency comparisons must be done carefully. RCW 34.05.030.

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The difference in remedies available between initial and final orders is enlightening as well. It is important for the Council to take note of the fact that under its procedural rules a review and modification of an initial order is allowed, but such relief is not provided for in respect to final orders. This distinction holds true under the model rules as well. Under both WAC 463-30-330 and WAC 10-08-211 any party may petition for a review of an initial order, and that review is limited to the facts on the record.[3] Comparing the relief presently requested by SE2 in this case to those procedures for reviewing initial orders, it appears that SE2 is actually asking the Council for the same relief offered for the review of an initial order, except they want that remedy applied to a final order. In reviewing Chapter 463-30 WAC, it is evident that such relief has simply not been made available in relation to final orders. This is true under the model rules as well. The different treatment of the two orders is highlighted by the fact that reconsideration appears limited to only final orders. Since Order #754 is a final order, the broader review and modification procedure available for initial orders is simply not applicable to the case at hand. This result is also consistent with our own model rules, as they also limit the type of relief sought by SE2 to initial orders.

The Council's procedural rules regarding the settlement of differences between parties to an adjudication also indicate that a reconfiguration of an application at this juncture in the proceeding is untimely. Under WAC 463-30-250, settlement of differences between parties is encouraged during and after adjudicative hearings. Under WAC 463-42-690(3) amendments to an application including any commitments or stipulations made by an applicant during the course of a hearing process may be submitted by the applicant within 30 days of the conclusion of a hearing. These provisions of the Council's rules show that settlements are encouraged. However, if the Council now decides to allow applicants to alter their applications after hearings conclude so that they might fit only those concerns expressed by the Council in their final decision, no applicant would be likely to enter into any settlements during the course of any hearing thereafter. After all, why bother when you know that the Council will allow you to manipulate your application after the fact if you simply bring a motion for reconsideration. A poor precedent to set. It would discourage settlements.

Instead, RCW 80.50.100(3) suggests the proper avenue for the relief sought by SE2 is via new application, not a motion for reconsideration. This guiding statute for the Council states that, if the governor rejects an application, the applicant can resubmit a new application which is based on different conditions or new information. RCW 80.50.100(3) provides us clear guidance in respect to what an aggrieved applicant may properly do in those instances when its application has been denied. According to the governing law, an applicant may propose an alternative plan, but the proper vehicle for submitting such proposals is by way of a new application, not a motion for reconsideration. It not only provides a mechanism by which the finality of the agency

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[3] Although the Council has not adopted the WAPA model rules for its adjudications, see WAC 463-30-010, when the two are compared the differences in respect to review or reconsideration of initial verses final orders are of little consequence. In relevant parts, they are essentially the same. Thus, if we wish to strive for internal consistency, the model rules may be helpful to understanding the issues surrounding reconsideration too. After all the model rules supplement those of the WAPA, and "...in the absence of other rules to the contrary, these model rules shall govern any adjudicative proceedings under the Administrative Procedure Act." WAC 10-08-001(4).

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decision can be respected, but allows the applicant a means of reacting to an adverse final decision in a more appropriate manner. Once a new application is submitted, all interested parties and the Council can have the benefit of a new hearing process to properly scrutinize the new or modified application as a whole. The due process rights of all parties are protected and the integrity of the Council's procedural rules are maintained.

As in the present case, requests for reconsideration are often intertwined with offers of new evidence. This presents the issue of whether a hearing should be reopened. Granted, SE2 specifically does not want the Council to reopen the hearing in this matter. They obviously fear that the newly discovered earthquake assessment would offer powerful additional grounds for the Council to find that the site is not an appropriate one to build their plant. However, by their motion for reconsideration, SE2 has reformulated their application and offer a series of new and different ideas as to how their plant might be configured and under what conditions they might operate (such as now volunteering for long term contracts). For the first time, and long after their closing brief to the Council, they offer new concessions and design changes and none of these concessions or changes are a part of the record in this matter. It is all new evidence. In essence, the Council is being asked to review a new application presented in the guise of a motion for reconsideration.[4]

However, at least in the realm of judicial reconsideration, it is uniformly accepted that a motions for reconsideration of a final decisions must be decided solely on the evidence already submitted to the tribunal. Unless this rule of law is followed, there is no foundation laid for the newly offered evidence. There is no opportunity for objections to its admission to be given. The opportunity to critically analyze the information which can be developed from the cross-examination of witnesses is lost. Essentially, there is a denial of due process. Jet Boats Inc. v. Puget Sound National Bank, 44 Wn.App.32, 42, 721 P.2d 18 (1986); Biehn v. Lyon, 29 Wn.2d 750, 758, 189 P.2d 482 (1948).

The Council must be mindful that the concepts of due process and fundamental fairness which spring from our Constitution are applicable to hearings conducted under the WAPA. *See, e.g.*, Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995); State ex rel. Beam v. Fulwiler, 76 Wn.2d 313, 456 P.2d 322 (1969). A fair administrative hearing includes an opportunity know the claims of the other party and a meaningful opportunity to meet those claims. In re Cuddy v. Dept. of Public Assistance, 74 Wn.2d, 19, 442 P.2d 617 (1968). The legislature has specifically declared that nothing within the WAPA may be held to diminish the Constitutional rights of any party. RCW 34.05.020. If tribunals allowed litigants to reverse or significantly change the theories of their case and to submit new evidence after an adjudication is completed, as SE2 is asking the Council to do in this instance, the fairness and process due under the Constitution to

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[4] Unfortunately for SE2, there can be no modifications to the permit at this time. The ability to alter the application was lost to the Council and SE2 long ago. *See* WAC 463-42-690. To allow SE2 to propose a modified application at this time violates the Council's own procedural rules. This violation offers additional evidence that SE2's request goes well beyond the bounds of the relief which can be offered within the framework of a motion for reconsideration.

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the other parties is simply lost. This is why, in large part, that motions for reconsideration are limited to correcting errors of law or fact based on the record previously established.

Reopening a hearing is not a preferred course of action, it is one reserved for extraordinary circumstances. Cities of Campbell v. F.E.R.C., 770 F.2d 1180, 1191 (CA, D.C., 1985). The administrative process cannot provide for a constant reopening of records to consider new facts. There is need for finality. Given the inevitable lag times between the receipt of evidence and the ultimate decision, there would be little hope that the administrative process could ever come to a conclusion if merely the offer of new evidence would require reopening the hearing. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519, 555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The only extraordinary circumstances surrounding SE2's request for reconsideration and their offered new application is the fact that they failed to foresee or adequately investigate the site or mitigate the many negative impacts which their project was found to present. Lack of compromise or foresight on the applicant's behalf is not a basis upon which to reopen a hearing, particularly in light the remedy available to SE2 under RCW 80.50.100(3). That portion of SE2's motion which is predicated upon its new application must be denied.

III. Given the findings of the Council, the changes proposed cannot satisfy all objections and concerns.

In the course of this proceeding, Whatcom County expressed a variety of concerns about the potential adverse impacts from the project. Many of those concerns are adequately addressed in the briefing of Counsel for Environment incorporated herein by previous reference and need not be repeated. However, some additional comment is warranted.

The principal problem presented by the concessions now offered by SE2 as modifications to their application is that they remain quite vague. Although the Council expressed the same concern in its final decision, the new concessions continue to lack sufficient specificity to properly analyze them. For example, with respect to mitigating flooding impacts, SE2 proposes for the first time in the course of this proceeding to undertake a more detailed flood analysis. In a effort to satisfy the Council's concerns (not the County's) SE2 proposes, "[a]t least six months prior to construction, SE2 shall submit for the Council's approval a report of the unsteady modeling results and recommendations for *reasonable* mitigation of any adverse off-site impacts." Motion for Reconsideration at 25, lines 33-37 (emphasis added).

The record is clear. Increased flood depths and velocities will cause increased damage to residences, farms, and county facilities in the area. Inasmuch as SE2 characterized the County's request for SE2 to pay for the cost of any necessary mitigation measures for damage to County facilities "insincere," and responded that the County should simply use tax dollars rectify any damages caused by the plant, one has to wonder just what costs SE2 might ultimately view as being "reasonable." Neither the County nor the Council can know what that term might mean to SE2 after the needed studies are performed. These are the sort of issues that lead to litigation.

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While they may make work for attorneys, they are not the sort of issues to be left open in site certifications.

Another, but equally fundamental problem with SE2's approach to the flooding issue is that it removes the issue as a factor in determining whether the site itself is suitable for such a project. One of the duties of the Council is to resolve the core question of whether it makes sense to locate a energy facility of this type at this particular location. From the record before the Council we know the plant will sit within a floodplain. We know that its existence will have an impact upon how those floodwaters within the floodplain move and we know that those waters will have an impact upon it as well. Given the lack of adequate modeling however, we don't know what those impacts are likely to be. Without that information up front, the Council cannot answer the basic question of just how wise is it to place a power plant at this location.

SE2 portrays the project a being a essential pubic facility, one that is essential to meet the public's need for energy. If in fact this plant is as necessary as SE2 portrays it to be, does it make sense to locate it within a floodplain without an adequate read on how that facet of the site might impact it? Does it make sense to locate such a facility in harms way? Additionally, given the presence of fault lines and very deep liquifiable soils, there is further evidence to suggest that geologically the site is fundamentally wrong for facility upon which the public might rely. Offering to mitigate consequential damages does nothing toward answering the core question of whether this is an appropriate location in the first place. This is still an open question!

IV. Since the proffered amendments to its application represent new evidence, in order to entertain SE2's request, the hearing must be reopened.

Unless there has been a change in the law applicable to the case (which has not happened here) or perhaps a new fact is revealed of the sort which the Council could take official notice, a motion for reconsideration should be decided on the existing record. *See, e.g.*, Jet Boats, Inc. v. Puget Sound Nat'l Bank, 44 Wn.App. 32, 721 P.2d 18 (1986). The Council also needs to remember that reopening a hearing is not a preferred course of action, instead it is one reserved for extraordinary circumstances. Cities of Campbell v. F.E.R.C., 770 F.2d 1180, 1191 (CA, D.C., 1985). The only extraordinary circumstance in the present case is that the applicant is trying now to amendment its application. A circumstance brought about by its own tactical decisions.

In spite of the fact that the bulk of SE2's motion constitutes new evidence in the form of amendments to the application, SE2 asks the Council not to reopen the hearing. While this makes sense from a tactical perspective given the newly discovered geological information on the site, if Council wishes to entertain SE2's amendments, it must reopen the hearing in order to receive those amendments, after all the application itself is an exhibit in this matter and it does formally represent a part of the evidence in this case. Accepting amendments to the application is in fact accepting new evidence.

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By reopening the hearing, the Council could receive into evidence the proffered amendments. The Council could then set a schedule which, for example, would allow SE2 to rerun its modeling on the flooding impacts of the project. To protect the due process rights of all concerned, that data could be disclosed to the parties and they could be given adequate time to evaluate the information. Perhaps some would wish to enter into settlement talks with SE2 about the issue, if SE2 were to feel inclined to do so. The Council must then hold an evidentiary hearing on the information so that it too could weigh the information and determine whether, if appropriate, any mitigation measures would truly be "reasonable" under the circumstances. As SE2 has supplemented its motion for reconsideration with new information on air quality, perhaps that information needs to be scrutinized as well.[5] All of these concerns could be best redressed by revisiting within the context of the adjudicative process.

In essence, to accommodate the due process rights of all the parties, each offer of modification to the permit should be taken as reason to reopen the hearing on that subject. Without such measures, no party would be given a fair and full opportunity to meet and, if necessary, challenge the impacts of each change. Given the sweeping nature of the proffered changes, in order afford some semblance of due process the bulk of the issues originally before the Council would need to be revisited. In the end, the Council would be facing the daunting task of relitigating many of the original issues in this matter. Avoiding such quagmires and to provide needed finality to judgments is precisely why the grounds for reconsideration and the relief available under the motion have been kept so limited. This is also why under the statutory framework of chapter 80.50 RCW the stated remedy for applicants in the position of SE2 is to have them start anew. RCW 80.50.100(3). Simply put: a motion for reconsideration is clearly not the appropriate vehicle to remedy an inadequate application.

[5] The evidence submitted by SE2 in their motion for reconsideration appears to create more questions about air quality in the Fraser Valley rather than providing the Council with specific data upon which to base a revised decision. The summary report, "Appendix A" to the Motion for reconsideration, was authored by representatives of four health regions in B.C. Maps defining the regions indicate that Fraser Valley Health Region representation may be lacking. As the area east of Vancouver to Hope lies within the Fraser Valley Health Region, and this area does not seem to be represented in the summary report, the conclusions pertaining to the region may be suspect. Additionally, the methods of comparing an entire region to cities in western Northern America leaves some question as to how diluted the levels of pollutants may be before comparison. Finally, the authors of the report also mention that issues of visibility, odors and greenhouse gas need to be involved in air quality management, this comment indicates that these factors were not included in their analysis. These facets of the report highlight to need to subject such evidence to the adjudicative process.

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CONCLUSION

This is not the last chance for SE2, they can submit a new application. If so, they can utilize much of work they have already done. RCW 80.50.100(3) provides for this relief if it becomes necessary. In contrast, given the precedence which could be set by the Council if it chooses to grant this request for reconsideration, it may well be the last chance for the Council to uphold the integrity of the adjudicative process, the Council's own adopted rules of procedure, and procedural framework underlying chapter 80.50 RCW. Due process and fundamental fairness calls for a rejection of the motion. Uphold the law and the integrity of your final decision, deny this motion for reconsideration.

Respectfully submitted this 30th day of March, 2001.

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